MEHRZAD NABAVIEH & ANOR v. CHONG SHAO FEN & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
LIM YEE LAN JCA
NALLINI PATHMANATHAN JCA
[CIVIL APPEALS NO: W-02(NCVC)(W)-1698-07-2013 &
W-02(NCVC)(W)-1699-07-2013]
24 MARCH 2016

TORT: *Damages – Claim for – Construction of building – Damage to adjoining/neighbouring property – Independent contractors – Liability – Whether employers of independent contractor owed non-delegable duty of care – Whether independent contractors should be jointly liable as tortfeasors*

Chong Shao Fen and Lai Siow Lien ('the plaintiffs') were joint registered and beneficial owners of a property ('the property') while Mehrzad Nabavieh and Noushin Goudarzi ('the first and second defendants') were the registered and beneficial owners of the lot adjoining the property ('the neighbouring property'). The other defendants were the third, fourth and fifth defendants namely the architect, the independent contractor and the civil engineer. The plaintiffs had been residents at the property since 2001. In May 2009, the first and second defendants commenced work to construct a bungalow on the neighbouring property ('the project'). The plaintiffs complained that as a result of the works on the neighbouring property, the plaintiffs' property was damaged. In the circumstances, the plaintiffs commenced a suit against the defendants for negligence. The High Court Judge found that only the first and second defendants were to be held liable for the entire loss and damage suffered by the plaintiffs. The third, fourth and fifth defendants were held to be not liable for the losses and damages. The High Court Judge reasoned that the duty of care owed by the first and second defendants to the plaintiffs was a non-delegable duty as enunciated in the case of *Bower v. Peate*. Two appeals were filed in respect of the decision of the High Court. The plaintiffs appealed against part of the High Court decision which dismissed their claim against the other defendants ('appeal 1699') whilst the first and second defendants appealed against the decision of the High Court in allowing the claim against them only, but not the other defendants ('appeal 1698'). The issue that arose for determination was whether liability should be limited to the first two defendants only on the basis of the existence of a non-delegable duty of care, or whether such liability should be jointly shared amongst all the other defendants, as tortfeasors.

Held (allowing plaintiffs' appeal; dismissing defendants' appeal)
Per Nalini Pathmanathan JCA delivering the judgment of the court):

(1) The principle to be gleaned from *Bower v. Peate* is that no man can get rid of liability for injury occasioned to another by a wrongful act, by seeking to throw the responsibility on an agent whom he has employed

to do the act. However, this was not a case where the independent contractor could be held to be completely exempt from liability on the grounds that the first and second defendants had a common law non-delegable duty to bear all responsibility for the loss suffered. (paras 20, 21 & 22)

(2) The general principle is that employers are not liable for the acts of independent contractors. However, where the work is necessarily attended with risk, employers cannot free themselves from liability by binding the contractor to take effectual precautions. The employer is bound to see that the contract is performed, and is therefore liable, as well as the contractor, to repair any damage which may be done. Therefore, the first and second defendants should not be held liable alone. The fourth and fifth defendants should also be liable for the damage which was occasioned to the plaintiffs' property. (para 27)

(3) The evidence adduced through the two experts disclosed that the loss and damage suffered by the plaintiffs was caused by the acts and omissions of the fourth and fifth defendants, and the first and second defendants in failing to supervise or causing the fourth and fifth defendants to rectify the damage. In short, the expert evidence suggested liability on the part of the defendants collectively in differing proportions, rather than a non-delegable duty on the part of the first and second defendants only. As such, the judge erred in invoking and applying the proposition of law that the first and second defendants owed a non-delegable duty of care to the plaintiffs to the exclusion of the other defendants. (paras 39, 44 & 45)

Bahasa Malaysia *Headnotes*

Chong Shao Fen dan Lai Siow Lien ('plaintif-plaintif') adalah pemilik berdaftar dan benefisial bersama sebuah hartanah ('hartanah') manakala Mehrzad Nabavieh dan Noushin Goudarzi ('defendan pertama dan kedua') adalah pemilik berdaftar dan benefisial lot bersebelahan hartanah tersebut ('hartanah bersempadan'). Defendan-defendan lain adalah defendan ketiga, keempat dan kelima defendan iaitu arkitek, kontraktor bebas dan jurutera awam. Plaintif-plaintif telah menetap di hartanah tersebut sejak 2001. Pada Mei 2009, defendan pertama dan kedua memulakan kerja-kerja membina sebuah banglo di hartanah bersempadan itu ('projek'). Plaintif-plaintif mengadu bahawa akibat kerja-kerja di harta bersempadan itu, hartanah plaintif-plaintif mengalami kerosakan. Dalam hal keadaan ini, plaintif-plaintif memulakan guaman terhadap defendan-defendan bagi kecuaian. Hakim Mahkamah Tinggi mendapati bahawa hanya defendan pertama dan kedua bertanggungan bagi keseluruhan kerugian dan kerosakan yang dialami oleh plaintif-plaintif. Defendan ketiga, keempat dan kelima diputuskan tidak bertanggungan atas kerugian dan kerosakan. Hakim Mahkamah Tinggi mendapati bahawa kewajipan berjaga-jaga oleh defendan pertama dan kedua

kepada plaintif-plaintif adalah kewajipan yang tidak boleh diwakilkan seperti yang termaktub dalam kes *Bower v. Peate*. Dua rayuan difailkan terhadap keputusan Mahkamah Tinggi. Plaintif-plaintif merayu terhadap sebahagian keputusan Mahkamah Tinggi yang menolak tuntutan mereka terhadap defendan-defendan lain ('rayuan 1699') manakala defendan pertama dan kedua merayu terhadap keputusan Mahkamah Tinggi membenarkan tuntutan terhadap mereka sahaja, tetapi bukan terhadap defendan-defendan yang lain ('rayuan 1698'). Isu yang berbangkit bagi penentuan adalah sama ada liabiliti sepatutnya terhad kepada defendan pertama dan kedua sahaja atas dasar kewujudan kewajipan berjaga-jaga yang tidak boleh diwakilkan atau sama ada liabiliti sedemikian seharusnya dikongsi secara bersama antara semua defendan-defendan lain, sebagai pelaku tort.

Diputuskan (membenarkan rayuan plaintif-plaintif; menolak rayuan defendan-defendan)

Oleh Nalini Pathmanathan HMR menyampaikan penghakiman mahkamah):

(1) Prinsip dalam kes *Bower v. Peate* adalah tidak ada orang yang boleh menghapuskan liabiliti kecederaan berlaku kepada yang lain melalui tindakan salah, dengan mengalihkan tanggungjawab kepada ejen yang digunakan untuk melakukan pekerjaan tersebut. Walau bagaimanapun, ini bukan kes di mana kontraktor bebas boleh diputuskan untuk dikecualikan sepenuhnya daripada liabiliti atas alasan bahawa defendan pertama dan kedua mempunyai kewajipan yang tidak boleh diwakilkan di bawah common law untuk memikul segala tanggungjawab bagi kerugian yang ditanggung.

(2) Prinsip umum adalah majikan tidak bertanggungan terhadap tindakan kontraktor bebas. Walau bagaimanapun, di mana kerja berbekalkan risiko, majikan tidak boleh membebaskan diri mereka daripada liabiliti dengan mengikat kontraktor untuk mengambil langkah berjaga-jaga berkesan. Majikan terikat untuk memastikan bahawa kontrak itu dilaksanakan dan dengan itu bertanggungan, bersama kontraktor, untuk memperbaiki sebarang kerosakan yang mungkin dilakukan. Lantaran itu, bukan defendan pertama dan kedua sahaja seharusnya diputuskan bertanggungan. Defendan keempat dan kelima juga perlu bertanggungan atas kerosakan yang dilakukan atas hartanah plaintif-plaintif.

(3) Keterangan yang dikemukakan melalui dua pakar mendedahkan kerugian dan kerosakan yang dialami oleh plaintif-plaintif adalah disebabkan oleh tindakan dan kegagalan defendan keempat dan kelima, dan defendan pertama dan kedua dalam kegagalan untuk menyelia atau mengarahkan defendan keempat dan kelima untuk membetulkan kerosakan. Secara ringkas, keterangan pakar mencadangkan liabiliti di pihak defendan-defendan secara kolektif dalam kadar berbeza, dan bukan kewajipan yang tidak boleh diwakilkan di pihak defendan

pertama dan kedua sahaja. Dengan itu, hakim terkhilaf dalam memohon dan menggunakan anjuran undang-undang bahawa defendan pertama dan kedua mempunyai kewajipan berjaga-jaga yang tidak boleh diwakilkan kepada plaintif-plaintif dengan pengecualian terhadap defendan-defendan lain.

Case(s) referred to:

Alcock v. Wraith [1991] 59 BLR 16 ***(refd)***
Biffa Waste Services Ltd & Anor v. Maschinenfabrik Ernst Hese GmbH [2009] 3 WLR 324 ***(foll)***
Bower v. Peate [1876] 1 QBD 321 ***(foll)***
Dalton v. Henry Angus & Co [1881] 6 App Cas 740
Farraj v. King's Healthcare NHS Trust [2010] 1 WLR 2139 ***(refd)***
Honeywill & Stein Ltd v. Larkin Brothers Ltd [1934] 1 KB 191 ***(refd)***
Read v. J Lyons & Co Ltd [1947] AC 156 ***(refd)***
Woodland v. Swimming Teachers Association and Others [2012] EWCA Civ 239 ***(refd)***

For the appellants - Pramjit Singh; M/s KK Lim & Assocs
For the respondents - Lum Chee Seng; M/s Gunaseelan & Assocs

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: 22NCVC-788-2011 (overruled in part).]

Reported by Sandra Gabriel

JUDGMENT

Nallini Pathmanathan JCA:

[1] The primary issue that arises for consideration in this appeal is the relief to be granted to Chong Shao Fen and Lai Siow Lien, who were the plaintiffs in the court below, against several defendants including Mehrzad Nabavieh and Noushin Goudarzi, who were the first and second defendants in the court below in respect of their action founded in the tort of negligence and trespass. The salient facts are set out below. The parties will be referred to as they were in the court below in Civil Suit No. 22NCVC-788-2011.

[2] There were two appeals filed in respect of the decision of the High Court. Appeal No. W-02(NCVC)(W)-1698-07-2013 was filed by Mehrzad Nabavieh and Noushin Goudarzi against the decision of the High Court in allowing the claim against them only, but not the other defendants, while Appeal No. W-02(NCVC)(W)-1699-07-2013 was filed by Chong Shao Fen and Lai Siow Lien to appeal against that part of the High Court's decision which dismissed their claim against the other defendants. In essence, both appeals deal with the dismissal of the plaintiffs' claim against the third, fourth and fifth defendants namely the architect, the independent contractor and the civil engineer.

The Parties

[3] The plaintiffs, Chong Shao Fen and Lai Siow Lien ('the plaintiffs') are the joint registered and beneficial owners of the property bearing the address No. 50, Jalan Taman Pantai, Bukit Pantai, 59100 Kuala Lumpur held under Geran No. Hakmilik: 2724, Lot 14960, Mukim Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan ('the property'). A three-storey bungalow is erected on the property.

[4] The first and second defendants, Mehrzad Nabavieh and Noushin Goudarzi ('the first and second defendants) are the registered and beneficial owners of the lot adjoining the property. The first and second defendants' property bears the address No. 52, Jalan Taman Pantai, Bukit Pantai, 59100 Kuala Lumpur held under Geran No. Hakmilik: 2723, Lot 14959, Mukim Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan ('the neighbouring property').

[5] The other defendants in the High Court are collectively the architect, namely Designworks Architects & Construction Sdn Bhd ('the third defendant'); the independent contractor, namely Majestic United Sdn Bhd ('the fourth defendant'); and the civil engineer, Azman bin Teh ('the fifth defendant').

Background Facts

[6] The plaintiffs have been residents at the property since 2001.

[7] In May 2009, the first and second defendants commenced work on their property with a view to demolishing an old structure which stood on their property and to construct a two-storey (above) and three-storey (below) bungalow ('the project').

[8] The plaintiffs complained that as a result of the demolition works on the first and second defendants' property, in mid-July 2009 the plaintiffs' property was damaged.

[9] The damage manifested itself in the form of:

(i) cracks on the common wall;

(ii) the drains beside the common wall cracked, and soil from the project site flowed on to the plaintiffs' property;

(iii) the concrete flow and the staircase at the back of the plaintiffs' property cracked; and

(iv) a large hole appeared in the garden beside the house.

[10] The plaintiffs commenced a suit against the defendants in negligence complaining of, *inter alia*, the following matters:

(i) the failure as a whole to take reasonable care in executing the project;

(ii) the failure to follow the plans as approved by "Jabatan Rekabentuk Bandar dan Bangunan" in the execution of the project;

(iii) the failure to take into consideration the condition and stability of soil at the site of the project and the surrounding area before commencing the demolition and the excavation;

(iv) the failure to monitor the soil condition at the site of the project and also the surrounding area before and during the demolition and the excavation; and

(v) the failure to monitor the workers at the site of the project sufficiently and/or at all, to ensure the construction work is stopped upon discovering damage to the plaintiffs' house.

[11] As a consequence, the plaintiffs have sought the following reliefs:

(i) that the first and second defendants collectively undertake the necessary repair works to restore the basic structure of the house belonging to the plaintiffs to its original state; and

(ii) that the first and second defendants collectively bear the cost incurred by the plaintiffs in such restoration.

The High Court Decision

[12] In his judgment, the learned trial judge found that the first and second defendants only were to be held liable for the entire loss and damage suffered by the plaintiffs. The third, fourth and fifth defendants were held to be not liable for this loss and damage as the trial judge reasoned that the duty of care owed by the first and second defendants to the plaintiffs was a non-delegable duty.

[13] As such, the learned judge ordered:

(i) that the first and second defendants and/or their servants cause the land and drainage systems to be immediately backfilled and the property compacted within one month of the date of the judgment;

(ii) that the first and second defendants commence the reinstatement work for the collapsed wall and boundaries within one month of the date of the judgment; and

(iii) if they fail to do so within the time stipulated, the plaintiffs were entitled to carry out these works and recover such costs from the first and second defendants.

[14] Finally, the learned judge also awarded general damages in favour of the plaintiffs to be assessed by the court.

The Decision Of The Court Of Appeal

[15] Having heard the parties, we were not convinced that Appeal No: W-02(NCVC)(W)-1698-07-2013 should be allowed in respect of liability. In short, we concurred with the learned judge that the first and second defendants were liable for the losses suffered by the plaintiffs. However, we differed from the learned judge in that we concluded that the fourth and fifth defendants, namely Majestic United Sdn Bhd and Azman bin Teh, were also joint tortfeasors who were liable in differing proportions.

[16] Further, we did not concur with the learned judge that the duty of care owed by the first and second defendants to the plaintiffs was a non-delegable duty, *albeit* under common law or statute.

[17] The general position is that if an employer, such as the first and second defendants here, have employed an independent contractor to do work on their behalf, the first and second defendants are not responsible for any tort committed by the independent contractor in the course of the execution of the work. As such, they are not liable directly for any torts committed, unless the damage complained of may also be attributable to the negligence or personal fault of the employer.

[18] In the instant case, the plaintiffs have alleged negligence on the part of the employers in failing to oversee or supervise or rectify the acts or omissions of the independent contractor, which comprises negligence on the part of the first and second defendants. Additionally, it is alleged that the first and second defendants have authorised or ratified the other defendants' tortious acts, such that they are jointly liable with the independent contractor and civil engineer for the loss and damage suffered by the plaintiffs.

[19] We were therefore not persuaded that this was a case where the duty of care owed by the first and second defendants to the plaintiffs is a non-delegable duty. In his grounds of judgment, the learned judge failed to explain or substantiate his basis for concluding that the duty owed, on the facts of this case, amounted to a non-delegable duty. The learned judge simply concluded that this was the case, citing the English decision of *Bower v. Peate* [1876] 1 QBD 321.

[20] The principle to be gleaned from *Bower v. Peate (above)* is that no man can get rid of liability for injury occasioned to another by a wrongful act, by seeking to throw the responsibility on an agent whom he has employed to do the act.

[21] The evidence in this case shows, however, that this is not a case where the employer can be said to be completely exempt from liability for negligence, simply because he has hired the independent contractor to carry out the works. This will be discussed further below.

[22] Neither was this a case where the independent contractor could be held to be completely exempt from liability on the grounds that the first and second defendants had a common law non-delegable duty to bear all responsibility for the loss suffered. The plaintiffs had not in any event pleaded any such non-delegable duty. The plaintiffs sought a prayer for joint liability amongst the defendants as tortfeasors.

[23] The issue of the existence of a non-delegable duty was not put to the parties to allow them to invoke or submit on this issue. It would appear that the learned judge had imposed such a non-delegable duty on solely the first and second defendants in his judgment without the benefit of any submissions on this point. In short, the parties were deprived of being heard on this issue, namely whether the first two defendants owed a common law non-delegable duty to bear responsibility for all loss suffered as a consequence of the construction on the neighbouring lot.

The Law: Withdrawal Of Support From Neighbouring Land

[24] The case of *Bower v. Peate* is classified by *Clerk & Lindsell*, 20th edn, Sweet & Maxwell (2010) under the sub-heading of "withdrawal of support from neighbouring land". The issue that falls for consideration in our case is whether liability should be limited to the first two defendants only on the basis of the existence of a non-delegable duty of care, or whether such liability is jointly shared amongst all the other defendants, as tortfeasors.

[25] In deciding the said issue, it is necessary to ascertain whether the third to fifth defendants are servants/agents or independent contractors. This is because the first and second defendants would be vicariously liable for the acts of the third to fifth defendants if they were servants/agents. But if they are independent contractors, the general principle applies, ie, that the employers would not be liable for their negligent acts. The English Court of Appeal's case of *Honeywill & Stein Ltd v. Larkin Brothers Ltd* [1934] 1 KB 191 is of assistance in differentiating between a servant/agent and an independent contractor. If the employer determines what is to be done and retains control of the actual performance, the doer is a servant/agent. However, if the employer prescribes the work to be done but leaves the manner of doing it to the control of the doer, the doer is an independent contractor. In our case therefore, the third to fifth defendants fell within the category of independent contractors rather than servant/agents. To that extent the general principle will prevail, ie, that the first and second defendants would not be liable for the negligent acts of the third to fifth defendants.

[26] After the case of *Bower v. Peate (above)*, the English House of Lords in the case of *Dalton v. Henry Angus & Co* [1881] 6 App. Cas. 740 held that when an employer contracts for the performance of work, which properly conducted can occasion no risk to his neighbour's house which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor.

[27] That is the general principle, that employers are not liable for the acts of independent contractors. However in that case, Lord Watson went on to say that in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed, and is therefore liable, **as well as the contractor,** to repair any damage which may be done (emphasis added). Therefore applying Lord Watson's pronouncement here, the first and second defendants should not be held liable alone. The fourth and fifth defendants should also be liable for the damage which was occasioned to the plaintiffs' property.

[28] Subsequent to these cases, the English Court of Appeal in the case of *Alcock v. Wraith & Ors* (1991) Times, 23 Dec held that the general rule is that one is not responsible for a tort by an independent contractor. But the exception is where the activity involved some special risk of damage, or is work which from its very nature was likely to cause danger/damage. The true basis for the exception in party-wall cases was where the law conferred a right to carry out work on a wall/division, and that work involved a risk of damage to the adjoining property, the law also imposed a duty on the party carrying out the work to ensure that it was carried out carefully.

[29] In *Alcock v. Wraith (above)*, Neill LJ stated that the owner of the damaged property was certainly entitled to claim damages against the independent contractor for negligence and trespass. His Lordship stated that for the purpose of deciding whether he could recover damages from the employers of the independent contractor, it did not matter whether the claim was framed in negligence, trespass or nuisance. His Lordship went on to hold that the owner of the damaged property could claim against the employers of the independent contractor. There was no further pronouncement made that the independent contractor was also liable, probably because it was stated at the outset that the independent contractor was adjudged a bankrupt after conducting the works which caused the damage to the property.

[30] Therefore from a consideration of the case law subsequent to *Bower v. Peate (above)*, it may be concluded that both the independent contractor as well as the employer would be liable for any damage occasioned to the property of neighbouring land.

The Law: Non-Delegable Duties

[31] The learned judge did not define what exactly amounts to a non-delegable duty of care, despite relying on this principle in his decision. This area of the law has been less than certain, as case law reveals that the courts have no one particular test in determining what amounts to a non-delegable duty. Therefore, it appears to us that an overview of the law relating to non-delegable duties would be timely.

[32] Non-delegable duties are exceptions to the general principle, that employers are not liable for the acts of independent contractors. According to *Clerk & Lindsell (above)*, non-delegable duties are dependent upon a finding that the employer is in breach of some duty personally owed to the claimant. If the law imposes a strict duty on the employer, then his duty cannot be discharged by delegating work to an independent contractor. There are statutory as well as common law non-delegable duties. However, for our purposes we will consider common law non-delegable duties since the parties did not invoke any statute which imposed non-delegable duties on the first two defendants.

[33] The textbook author acknowledged that it is difficult to know when non-delegable duties exist at common law, but submitted that a telling feature of the leading cases is that there is nearly always an affirmative duty for which the defendant has assumed responsibility.

[34] It is noted that the case of *Honeywill v. Larkin (above)* is authority for the proposition that the employer is liable for extra-hazardous acts of independent contractors. However, a recent English Court of Appeal's decision in *Biffa Waste Services Ltd & Anor v. Maschinenfabrik Ernst Hese GmbH & Ors* [2009] 3 WLR 324 stated that the application of the *Honeywill* principle should be kept as narrow as possible, and it should be applied only for activities that are exceptionally dangerous, whatever precautions are taken. The court adopted the words of Lord Macmillan in *Read v. J Lyons & Co. Ltd* [1947] AC 156; [1946] 2 All ER 471 on the suggested distinction between activities dangerous in themselves and those that are not:

> In truth it is a matter of degree … it would be impracticable to frame a legal classification of things as things dangerous and things not dangerous, attaching absolute liability in the case of the former but not in the case of the latter.

[35] Therefore, applying the case of *Biffa (above)*, it is not practical to have two lists of dangerous acts and non-dangerous acts. Further, it should not be an unshakeable presumption that employers are liable for dangerous acts of independent contractors. Each act and its circumstances should be looked at to determine whether an employer should be liable for the tort of the independent contractor.

[36] In the English Court of Appeal's case of *Farraj v. King's Healthcare NHS Trust* [2010] 1 WLR 2139, Dyson LJ at para. 91 stated:

> But in any event, to ask what the expectations of the claimant, whether reasonable or otherwise, would have been does not provide the answer to the question whether the hospital owes a non-delegable duty of care. I think that it is better to acknowledge that the question whether an employer owes a non-delegable duty of care to his employees to provide a safe system and whether a hospital generally owes a non-delegable duty to its patients is one of policy for the courts to determine by reference to what is **fair, just and reasonable.** (emphasis added)

[37] In the English Supreme Court's case of *Woodland v. Swimming Teachers Association and Others* [2012] EWCA Civ 239; [2013] UKSC 66, Lord Sumption JSC set out in para. 23 the factors that have given rise to non-delegable duties of care:

> If the highway and hazard cases are put to one side, the remaining cases are characterised by the following defining features: (1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes. (2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the claimant in the actual custody, charge or care of the defendant, and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of school children. (3) The claimant has no control over how the defendant chooses to perform those obligations, ie, whether personally or through employees or through third parties. (4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it. (5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.

[38] Here, can it be said to be "fair, just and reasonable" as in *Farraj (above)* that the first and second defendants be held to owe a non-delegable duty to the plaintiffs? In our view, that cannot be the case because the factors characteristic of the existence of such a non-delegable duty of care do not exist. Moreover the evidence from the expert reports shows that the both the first and second defendants as well as the other defendants should be liable in negligence to the plaintiffs.

The Evidence

[39] The evidence adduced through the two experts, Sr Prof William Napier Hamilton ('Professor Hamilton') and Ir Dr Gue See Sew of G & P Geotechnics ('Dr Gue'), discloses that the loss and damage suffered by the plaintiffs was caused by the acts and omissions of the fourth and fifth defendants, and the first and second defendants in failing to supervise or causing the fourth and fifth defendants to rectify the damage.

[40] Professor Hamilton found in his report that the collapse of the boundary wall and garden area of the property resulted from the unsupported excavation for the construction of deep basement areas on the neighbouring

lot. The contractor only undertook construction of a retaining wall after the collapse of the boundary wall and garden area. Before this, little had been done to protect the property, despite signs of significant soil movement in the lower garden area a few weeks before the collapse.

[41] It was the opinion of Professor Hamilton that:

> It is quite astonishing that such an extensive and deep excavation along the boundary of the adjoining property was made without adequate safety protection, not only for the workers on site but more importantly in this case, to safeguard lives and property at risk from the construction works to the neighbours on the adjoining lot … It is obvious that without providing proper support to the face of the excavations as the work progressed, the owners of the neighbouring Lot, their architects, engineers and contractors have been negligent and put the lives of the occupants of No 50 Jalan Taman Pantai, and their property, at high risk.

[42] Professor Hamilton commented that the work on the property was of a standard much below the original provision due to the use of much unskilled labour resulting in poor workmanship; use of low quality materials; lack of competent supervision etc.

[43] It would appear from Professor Hamilton's report that the first, second, fourth and fifth defendants are responsible. The first and second defendants' lack of supervision and the fourth and fifth defendants' lack of proper measures to prevent damage to the plaintiffs' property combined resulted in the loss and damage to the property.

[44] Dr Gue's report also observed that the collapse of the boundary wall and garden area of the property was due to the excavation at the neighbouring lot. Dr Gue found that proper temporary support was not provided by the contractor during the excavation, causing loss of support to the boundary wall and garden area. The collapse of the boundary wall and garden area in turn caused cracks and damages to the remaining boundary wall. In short the expert evidence suggests liability on the part of the defendants collectively in differing proportions, rather than a non-delegable duty on the part of the first and second defendants only.

[45] None of the factors that give rise to a non-delegable duty of care as in *Woodland (above)* are present on the facts of our case. As such, it is our considered view that the learned judge erred in invoking and applying the proposition of law that the first and second defendants owed a non-delegable duty of care to the plaintiffs to the exclusion of the other defendants.

Apportionment Of Liability

[46] We therefore varied the finding of liability to the extent that the independent contractor and engineer are joint tortfeasors with the owners of the neighbouring property. Our conclusion is supported by the evidence of the experts as set out above. Accordingly, liability was apportioned in the following *ratios*:

(i) the contractor, namely the fourth defendant, is 40% liable for the damage suffered by the plaintiffs together with the costs of the restitution works carried out on the property;

(ii) the engineers, namely the fifth defendant, are 30% liable for the damage suffered by the plaintiffs together with the costs of the restitution works carried out on the property;

(iii) the liability of the first and second defendants is therefore reduced to 30%; and

(iv) no liability is attributable to the architects, namely the third defendant.

The Relief Granted By The High Court Was Not Adequate

[47] Dr Gue made the following recommendations for immediate action in his report:

> (1) The collapsed land and drainage system shall be immediately backfilled and reinstated to prevent further erosion that could deteriorate and affect the bungalow's stability. Granular backfill material or sand should be properly compacted using either a rammer or small compactor.
>
> (2) The reinstatement works of the boundary wall, external staircase, tiling works, garden features, etc. could be carried out after the backfilling.
>
> (3) The remedial works shall be carried out under supervision of the design engineer's representative.

[48] These recommendations made by Dr Gue were duly carried out prior to the conclusion of the trial. In point of fact, a site visit was undertaken by the learned judge and the parties, and the remedial works undertaken were pointed out. Notwithstanding this the learned judge granted the same relief again at the conclusion of trial namely that:

(i) the land and drainage systems were to be immediately backfilled and properly compacted;

(ii) the first and second defendants to begin reinstatement works for the walls and boundary which had collapsed within one month from 26 June 2013, ie, on or by 25 August 2013. The costs of such reinstatement works are to be borne by the first and second defendants;

(iii) if the first and second defendants fail to carry out the foregoing, the plaintiffs are entitled to carry out other works and recover all costs from the first and second defendants; and

(iv) general damages to be assessed.

[49] The foregoing relief amounted to a replication of the earlier relief carried out prior to the site visit by the parties during the trial. In essence, the final relief ordered by the judge was ineffective as it had already been carried out, to no avail. For this reason, we were not satisfied that adequate relief had been granted to the parties.

[50] As such, we set aside the remedies as ordered by the learned judge and made the following orders:

(i) that Dr Gue be appointed jointly by the parties to conduct an independent inspection and assessment of the property and make the necessary recommendations to reinstate the property such that it is safe for habitation within two weeks from the date of our decision;

(ii) that Dr Gue's recommendations be implemented within three months from the date of his report, by the first and second defendants;

(iii) in the event that the first and second defendants fail to carry out Dr Gue's recommendations, the plaintiffs are at liberty to carry out the recommendations and the costs so incurred are to be borne by the first and second defendants and/or the fourth and fifth defendants;

(iv) the order for general damages is affirmed as per para. (iv) of the order; and

(v) parties are at liberty to apply to this court.

Conclusion

[51] In summary therefore, we dismissed Appeal No. W-02(NCVC)(W)-1698-07-2013 but varied the relief granted by High Court Judge. We allowed Appeal No. W-02(NCVC)(W)-1699-07-2013 and apportioned liability between the defendants.

[52] For both appeals, we granted costs of RM80,000 to the respondents in Appeal No. W-02(NCVC)(W)-1698-07-2013, ie, the appellants in Appeal No. W-02(NCVC)(W)-1699-07-2013. Both the deposits are refunded.